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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1010

MAX SLATTON, JR.,
Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION COMPANY, INC.,
d/b/a EBY & ASSOCIATES OF ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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The petitioner Max Slatton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 18, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at — F.2d — (8th Cir. 1974), is attached hereto as Exhibit A.

The unreported decisions of the United States District Court for the Eastern District of Arkansas, dated 11-28-73 and 4-10-74, are attached hereto as Exhibits B and C.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 18, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the trial judge abuse his discretion in granting a remittitur when the jury's verdict was patently within a reasonable and permissible monetary range and was amply supported by the evidence?

STATEMENT OF THE CASE

In a case of established liability under the Jones Act, petitioner's $85,000 jury verdict has been successively reduced by action of the United States District Judge until he has ended up with $17,267, less money than his lost wages to date. This result has been reached even though the jury was instructed on (1) loss of wages, (2) loss of earning capacity, (3) pain and suffering, (4) permanency of the injury, and (5) medical expenses. It has been reached even though the District Judge found specifically after the jury trial:

> There is no question that plaintiff sustained an injury to his back and the Court thinks that the jury could properly find, as it obviously did find, that the injury was permanent, and that the plaintiff was going to have some difficulty with

his back in the future and has sustained some diminution of his ability to work and earn money in the future.

The undisputed record in this case is that, as the result of a serious back injury, petitioner was off work completely for 15½ months. After he was released by his doctor, the Arkansas Employment Security office found a job for him in which he makes one-half the wages of his former occupation, which he can no longer follow. His past wage loss at the time of the trial was $14,000.

Since the trial on 10-17-73, he has lost approximately $7,000 by reason of reduced earning capacity, and will continue to lose $5,000 each year of his life. Over petitioner's life expectancy the loss of earning capacity will total aproximately $200,000. The record is replete with evidence of pain and suffering. There is abundant evidence that petitioner sustained a herniated disc and that his injuries are permanent. The final judgment entered in this case leaves petitioner completely uncompensated for loss of earning capacity, pain and suffering, and the permanency of his injury, even though all these elements of damage are amply supported in the record.

After the jury rendered its verdict for $85,000, the District Judge in response to post trial motions ordered a remittitur of the amount in excess of $50,000 on pain of a new trial on damages. Petitioner unsuccessfully tried to take an interlocutory appeal from this ruling. *Slatton v. Martin K. Eby Const Co., Inc.*, 491 F. 2d 707 (8th Cir. 1974). Relegated to the District Court for a final judgment, petitioner agreed to let Judge Henley try the case on the record previously made since it was obvious that the testimony would be the same and that no verdict in excess of $50,000 would be sustained. After crediting respondent with workmen's compensation payments, he entered judgment for $17,267.04 or about one-fifth of the jury verdict. The Court of Appeals affirmed on appeal from this final judgment. *Slatton v. Martin K. Eby Const. Co., Inc.*, —F2d— (8th Cir. 1974).

REASON FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case because the Court of Appeals, after adopting a proper rule for reviewing remittitur, did not apply the rule in this case. "We conclude that the standard we will apply in determining whether there was an abuse of discretion in ordering the remittitur is whether the remittitur was ordered for an amount less than the jury could reasonably find." — F.2d — at —. This rule is in accord with the Fifth Circuit and the Court of Appeals for the District of Columbia. *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972); *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969), *Cert.den.* 36 U.S. 835 (1969). It has the approbation of a leading text writer. "It is the only theory which has any reasonable claim of being consistent with the Seventh Amendment." 3 Barron & Holzhoff, Federal Practice & Procedure (Wright Ed.) 1305.1 p. 376.

Could the jury in this case reasonably find more than $50,000 in damages? Was any amount in excess of this figure "grossly and shockingly excessive"? Let us look at the evidence in the light of the elements of damage on which the jury was instructed.

1. *Wage loss.* It was undisputed that plaintiff was off work from May 16, 1972 until September 1, 1973 and that his lost wages during this period amounted to $13,400. On September 1, 1973 he found work through the efforts of the State Employment Security office at one-half his former pay. To date of trial Oct. 17, 1973 (six weeks) he had sustained an additional $600 in lost wages (the difference between his former and present earnings). Certainly the jury was entitled to take the full amount of plaintiff's wage loss in computing damages.

2. *Medical expenses.* The undisputed proof was that his medical expenses were $1,390.94.

3. *Loss of earning capacity.* The jury had a good criterion for arriving at this figure. Petitioner was making $200 a week before he was hurt and is now making $100 per week. Over his life expectancy the loss of earning capacity would amount to approximately $200,000. Reduction to present value would be offset by inflation. If his earning capacity were reduced by one-fourth, the reduction would amount to $100,000 and if reduced by one-eighth $50,000 (the amount of the recovery permitted after remittitur). The latter amount represents only a $25.00 weekly reduction of earning capacity, when to date it has been $100 weekly. In his memorandum and order of 11-18-73, Judge Henley recognized that the jury could find that petitioner "has sustained some diminution of the ability to work and earn money in the future." Petitioner's physician testified as follows:

> Q. Doctor, at that time did you make any finding or evaluation about this man's occupational future?
>
> A. I suggested at that time, because of his history of repeated recurrences of pain and spasm after trying to perform his usual occupation, that he may have some difficulty returning to such occupation. (A. 26-27)

Was it not the province of the jury to put a monetary value on this element of damage? If we subtract the undisputed wage loss to trial ($14,000) and medical ($1,390), this leaves $34,610 or $900 annually over his life expectancy. Would not such a figure be patently low for this element of damage even without taking into account two important remaining elements of damage?

4. *Permanency of the injury.* Much of the dispute in this case revolved around whether the petitioner has sustained a ruptured disc. The Court of Appeals adopted the respondent's position completely as to the herniated disc after earlier stating that "the medical testimony concerning the injury, its permanency, and the prognosis for recovery were in sharp contrast." — F.2d — at

—. The following passage from the Court's opinion is illustrative:

> The plaintiff testified about recurring pain and inability to do heavy work. Neurological tests failed to reveal a ruptured disc or a tendon injury. An electromyographic study secured by plaintiff's doctor showed the plaintiff was basically normal with some "very mild changes" in his left tibial nerve. Another specialist secured by plaintiff's doctor performed a myelographic study in an attempt to determine whether or not the plaintiff had a ruptured or bulging disc in his lower back. The myelograph disclosed no abnormality or irregularity along the spinal canal and the specialist testified that his examination was completely negative. The plaintiff's physician, Dr. Rooney, *thought he might possibly* have a ruptured disc, but that if he did have one, it was healed by February 23, 1973. Dr. Rooney had released the plaintiff for light work within a month of the accident.

With all due deference we must state that this passage misconceives the evidence in this case. Petitioners treating doctor *did* testify that the neurological tests indicated a herniated disc (A. 24-27). The specialist referred to was respondent's witness Dr. Clyde Glover, a radiologist, whom Dr. Rooney, the treating orthopedist, called to assist in the performance of a myelogram. Dr. Rooney actually performed the myelogram (A. 28). The attendance of a radiologist is necessary in this procedure, but it is performed by either an orthopedist or a neurosurgeon. Dr. Rooney and Dr. Glover disagreed as to the interpretation of the myelogram. Dr. Rooney, who was actually the specialist, considered the myelogram to be positive (A. 28-29). Dr. Glover, called by respondent, considered it negative, although on cross-examination he admitted that he had made a notation in the hospital records at the time that it "did not reveal any *definite* abnormality" (A. 62). The testimony as to the myelographic

findings were not undisputed, as indicated by the Court of Appeals, but raised a factual issue for the jury.

The statement by the Court of Appeals that Dr. Rooney thought petitioner might possibly have a herniated disc was apparently based on the following question and answer with reference to an examination on June 27, 1972:

> Q. And on the basis of those clinical findings, did you make a diagnosis on that occasion?
>
> A. I did not make a diagnosis, not specifically, but I did mention that there was a possibility of him having a herniated disc with these findings. (A. 25)

But his condition worsened and Dr. Rooney testified with reference to an examination on August 8, 1972:

> Q. Did you, on this occasion, make a diagnosis, Doctor?
>
> A. I thought at that time that he had findings consistent with a herniation of the disc at the L 4-5 level, which is the next to the lowest disc in the back. (A. 26)

Dr. Rooney admitted him to the hospital on August 13, 1972 where he remained five days. The admission and discharge diagnosis was "herniated disc, L 4-5 bilateral." (A. 27)

The statement in the Court of Appeals opinion about the disc being healed on February 23, 1972 was apparently based on the following questions as asked by respondent's counsel:

> Q. Just briefly, in the examination on February 22, 1973, was the straight leg raising test still negative?
>
> A. Yes.
>
> Q. Was there any muscle spasm present?
>
> A. No.

Q. Did he have normal motion in his lumbar spine?

A. Yes.

Q. Did he have any list at all in his lumbar spine?

A. No.

Q. Now, wouldn't all of these findings that you have just stated be objective findings that would be inconsistent with any presence of a ruptured disc at the L 4-5 level?

A. Consistent with that alone? It could be consistent with a healed disc, too. (A. 42)

We again respectfully submit that Dr. Rooney did not testify that petitioner's ruptured disc was healed on this date. Respondent's attorney selectively took four negative findings and asked if they would not be inconsistent with the presence of a ruptured disc. Dr. Rooney said they could also be consistent with a healed disc. But counsel studiously refrained from asking Dr. Rooney whether in his opinion, based on all his findings and the complete history of this patient, he had a ruptured disc or even a healed disc on this date.

While it is true as noted by the Court of Appeals that Dr. Rooney did release petitioner to try light work within a month after the accident, the record reflects that petitioner tried to return to light work "but got to hurting so bad he had to come home" (A. 77). His condition steadily grew worse for the next two months, and it was necessary to hospitalize him for the second time on 8-13-72 as noted above.

If the petitioner did have a ruptured disc, and there was abundant evidence from which the jury could have so found, it could logically have found such ruptured disc was a permanent injury. The Court of appeals, as noted above, found the medical testimony in "sharp contrast" as to permanency. Judge Henley in his opinion of 11-18-73 said that "the jury could

properly find, as it obviously did find, that the injury was permanent, and that the plaintiff was going to have some difficulty with his back in the future." How much in dollars and cents should a young working man with a wife and two children be compensated for a permanent injury to his back? Under our system of jurisprudence is not this a matter within the jury's competence.

5. *Pain and suffering*. This record is replete with pain and suffering. See Appendix 20, 21, 23, 26, 27, 28, 30, 31, 76, 77, and 78. Besides almost constant back pain over a period of approximately one year and a half, petitioner had to undergo a myelogram—surely one of the most painful procedures known to medicine. In *Gruenthal v. Long Island R.R.*, 393 U. S. 156 (1968), this Court held, in restoring a jury verdict reduced by the Court of Appeals, that $150,000 could be reasonably allocated to pain and suffering in a verdict of $305,000 for a crushed foot.

CONCLUSION

The Court of Appeals did not apply in this case the rule which it adopted as to review of remittitur. Its action contrasts with that of the Court of Appeals for the District of Columbia in *Taylor v. Washington Terminal, supra,* and the Court of Appeals in the Fifth Circuit in *Gorsalitz v. Olin Mathieson Chemical Co., supra.* In those cases the Court carefully reviewed the trial judge's action in light of the jury verdict. In the case at bar every inference, every implication was indulged in favor of the District Judge's view of the case, which completely comported with the position of respondent. The jury's view of the evidence counted for little or nothing with the result that petitioners received a trial on damages from the District Judge and not the jury, as was his entitlement under the Jones Act and the Constitution. If Max Slatton had been sent

to jail without a jury trial, as guaranteed by our statutes and Constitution, it would be a serious matter indeed. It is no less serious when he and his family are denied a decent livelihood by deprivation of the right of trial by jury.

Respectfully submitted

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APPENDIX

EXHIBIT A

United States Court of Appeals
for the Eighth Circuit

Nos. 74-1279 and 74-1302

Max Slatton, Jr.,

Appellant-
Cross-Appellee,

v.

Martin K. Eby Construction Co., Inc., d/b/a Eby and Associates of Arkansas,

Appellee-
Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

Submitted: September 13, 1974

Filed: November 18, 1974

Before Gibson, Chief Judge, Bright, Circuit Judge, and Smith, Senior District Judge.*

Gibson, Chief Judge.

Plaintiff Max Slatton, Jr., while working on a barge in the Arkansas River, injured his back and elected to bring this action for damages therefor under the Jones Act. 46 U.S.C. § 688, and under the maritime doctrine of unseaworthiness. A trial to a

* The Honorable Talbot Smith, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

jury resulted in a verdict of $85,000. The trial court,[1] after offsetting $1,732.96, for workmen's compensation benefits already received by Slatton, ordered a remittitur of $33,267.04, leaving a net judgment of $50,000. The plaintiff refused to accept the remittitur and a new trial was ordered on the issue of damages. After an interlocutory appeal on the remittitur was denied, *Slatton v. Martin K. Eby Construction Co.*, 491 F.2d 708 (8th Cir. 1973), the case was by agreement tried to the court solely on the issue of damages.

The trial court assessed damages at $19,000 and entered judgment for that amount less the workmen's compensation benefits offset. The plaintiff appeals, contending that there was a clear abuse of discretion by the trial court in granting a partial remittitur of the jury's verdict.[2] The defendant, Martin K. Eby Construction Co., cross-appeals, contending that the District Court lacked admiralty and Jones Act jurisdiction because Slatton was neither a seaman nor a crew member of a vessel in navigation at the time of his injury.

The plaintiff, a 32-year-old welder, sprained his lower back on May 16, 1972, when he and a coworker were attempting to move by hand a heavy (300-400 pound) piece of 12 inch diameter metal pipe across the deck of a floating work barge moored to a bank of the Arkansas River. The barge, 20 by 46 feet in size, was also secured to a "template," a temporary circu-

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[1] The Honorable J. Smith Henley, Chief Judge of the United States District Court for the Eastern District of Arkansas.

[2] The grant of a new trial is reviewable on appeal after the judgment is entered in the second trial. As noted in *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 379 (8th Cir. 1959), the "ruling on this motion [for a new trial in the first case], in the circumstances here present, presented a question of law reviewable on this appeal. If this ruling of the court constituted error as a matter of law, then plaintiff would be entitled on this appeal to have the original verdict and judgment returned and entered on the first trial of the case restored."

lar working platform made of steel, utilized in constructing a "dolphin." A dolphin is a permanent river structure to which vessels can be moored. The plaintiff and his coworker would cut lengths of metal pipe to be used in constructing the dolphin. These would then be moved from the barge to the template encircling the dolphin. On prior occasions a crane had been used to move the pipes from the barge to the template. No crane was available on May 16, and the employees attempted to transfer the pipe manually, one pulling while plaintiff pushed or scooted the pipe across the deck of the flat work barge. Halfway to the template, the plaintiff felt a sharp pain in his back and became numb in his extremities.

He spent a day in the hospital and then returned home. After a day at home he was readmitted to the hospital for a few days of therapy and traction. No surgery was performed and the medical testimony concerning the injury, its permanency, and the prognosis for recovery were in sharp contrast. Aside from two attempts at light work with his former employer, he did no work from the summer of 1972 until about three weeks before the case was tried in October of 1973 when he finally took a job driving and parking automobiles at about half of his former income.

The plaintiff testified about recurring pain and inability to do heavy work. Neurological tests failed to reveal a ruptured disc or a tendon injury. An electromyographic study secured by plaintiff's doctor showed the plaintiff was basically normal with some "very mild changes" in his left tibial nerve. Another specialist secured by plaintiff's doctor performed a myelographic study in an attempt to determine whether or not the plaintiff had a ruptured or bulging disc in his lower back. The myelograph disclosed no abnormality or irregularity along the spinal canal and the specialist testified that his examination was completely negative. The plaintiff's physician, Dr. Rooney, thought he might possibly have a ruptured disc, but that if he did have

one, it was healed by February 23, 1973. Dr. Rooney had released the plaintiff for light work within a month of the accident.

The trial court, in ordering the remittitur, found the jury's verdict to be "grossly and shockingly excessive" in light of the evidence.[3] Plaintiff contends that this action was an abuse of discretion. The first question we must consider is the extent of our review of the action of a trial court in requiring a remittitur as a condition for denying a motion for new trial. Defendant asserts that decisions of this circuit indicate we will only reverse such an action of a district court when there has been a "plain injustice" or a "monstrous" or "shocking" result.

We have indicated that this is the standard we apply for review of the refusal of the trial court to set aside a jury verdict on the grounds of excessiveness or inadequacy. As stated by Judge Blackmun, now Mr. Justice Blackmun, in *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961):

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[3] In its review of the verdict on Eby's motion for substantial remittitur the District Court stated:

> There is no question that plaintiff sustained an injury to his back, and the Court thinks that the jury could properly find, as it obviously did find, that the injury was permanent, and that plaintiff is going to have some difficulty with his back in the future and has sustained some diminution of his ability to work and earn money in the future.
>
> But the Court is forced to agree with defense counsel that the jury's verdict was grossly and shockingly excessive in the light of the evidence even after the defendant is allowed credit for the workmen's compensation that plaintiff has received.
>
> Personally, the Court thinks that an award within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff, but the Court recognizes that the amount to be awarded in a case of this kind rests largely in the discretion of the jury. The Court thinks that the jury might have been justified under the evidence in awarding plaintiff as much as $50,000, but that any award in excess of that sum would have been so grossly excessive as to shock the conscience of the Court.

> [W]e shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result.

Whether this in fact is a different standard than the abuse of discretion standard applied by other courts of appeals, as argued by defendant, is subject to some doubt, for as Judge Blackmun went on to say in *Solomon, supra* at 447-48:

> Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language. Perhaps in practice this court has observed a somewhat tighter standard than the others. In any event we still adhere to it.

(Footnote omitted.)

But whatever view may be taken of our standard for review of a trial court's action in refusing to overturn a jury award is not dispositive of the question before us in this case. Here we are not confronted on review with a jury determination as to a particular measure of damages buttressed by the conclusion of the trial court, who had the benefit of hearing the testimony and observing the demeanor of the witnesses, that the verdict should stand. When confronted with the concurrence of these two factors "an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied* 396 U.S. 835 (1969).

The situation presented by the present case requires an assessment of opposing considerations. A jury, upon consideration of the evidence, has awarded one quantum of damages. The trial court, upon his review of the evidence on the motion for new trial[4] has determined that the damages were excessive,

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[4] In its review of the evidence when passing upon a motion for new trial, the trial court is not limited to viewing the evidence in the

in fact "grossly and shockingly excessive." We are always mindful that the primary judge of the facts is the jury, and that its decision on the facts deserves great weight. Opposed to this in the present case is the decision of the trial court that the jury's award is excessive. We have traditionally given trial judges a large range of discretion in ruling on motions for new trial, particularly on the weight of the evidence, in recognition of the fact that they have heard the testimony and observed demeanor of the witnesses and are more aware of the community and its standards. *Solomon Dehydrating Co. v. Guyton, supra* at 447. Further, it is settled that the action of the trial court in setting aside a jury verdict is not in derogation of the right to trial by jury, "but is one of the historic safeguards of that right." *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 380 (8th Cir. 1959), *quoting Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350, 353 (4th Cir. 1941).

The issue presented as to the standard of review of a remittitur ordered as a condition of denying a new trial motion is one of first impression in this circuit. We have carefully considered the competing considerations mentioned above and the decision in *Gorsalitz v. Olin Mathieson Chemical Co.*, 429 F. 2d 1033 (5th Cir. 1970), where the same issue was presented for decision. We conclude that the standard we will apply in determining whether there was an abuse of discretion in ordering the remittitur is whether the remittitur was ordered for an amount less than the jury could reasonably find. *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972). *Cf. Taylor v. Washington Terminal Co., supra* at 148:

> In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated

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light most favorable to the prevailing party. It may weigh evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict. *Bates v. Hensley*, 414 F.2d 1006, 1011 (8th Cir. 1969); *Altrichter v. Shell Oil Co., supra* at 380.

> that a new trial motion will not be granted unless the "verdict is so unreasonably high as to result in a miscarriage of justice," or, most recently, unless the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."
>
> At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range."

(Emphasis in original.)

The trial court's determination of a reasonable limit to the jury award will be given considerable deference in our review.

In applying that standard to the facts of this case, we find no abuse of discretion on the part of the trial court. The trial court found the verdict to be "grossly and shockingly excessive." Our review convinces us that the trial court was justified in determining that $50,000 was the maximum limit justifiable under the evidence.

It is also clear from the District Court's statement in ordering the remittitur that it gave proper consideration to the jury's role in assessing damages. See n. 3, *supra*. The court's statement indicates that in ordering the remittitur it was allowing the maximum limit sustainable on a jury verdict even though it thought that $15,000 to $20,000 was fair and reasonable compensation.

In summation, we reiterate what was stated in *Solomon, supra* at 447, "that in our opinion, inadequacy or excessiveness of a

verdict is basically, and should be, a matter for the trial court * * *." We will not disturb its action on appeal absent a clear abuse of discretion. No clear abuse of discretion is shown here.

We turn now to the issue of subject matter jurisdiction raised by defendant. The defendant challenges the admiralty and maritime jurisdiction of the court by denying that plaintiff was a seaman or a crew member of a vessel of the defendant at the time of his injury. The defendant views plaintiff's exclusive remedy as either Arkansas workmen's compensation benefits or under the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, since the accident occurred upon navigable waters.

The Jones Act[5] is an expansion of the common law admiralty jurisdiction under Congress' Commerce and Necessary and Proper Clause powers. U.S. Const. art. I, § 8; *Swanson v. Marra Brothers*, 328 U.S. 1, 5 (1946); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943). The defendant points to *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969), as excluding from the definition of "vessel" in navigation and consequent admiralty jurisdiction floating dry docks and inland construction barges which have no navigational crews nor motive power of their own. In *Atkins* the court affirmed a summary judgment denying subject matter jurisdiction over an unseaworthiness claim by a shorebased welder injured on a floating dry dock. The court noted that the dry dock was moored in the exact position where it was constructed and that it was neither designed nor used for transportation.

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[5] The Act states in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *.

46 U.S.C. § 688.

The Fifth Circuit reached a similar decision in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973), in holding that a floating platform moored in navigable waters, secured to a dock by ropes and functioning only as a stationary construction platform not designed for transportation, was not a "vessel" for purposes of general maritime or Jones Act jurisdiction. The defendant here analogizes that its floating barge, moored to the bank and the template, was nothing more than a floating stage and not a vessel in navigation as a matter of law.

However, what is a vessel and who is a crew member are ordinarily jury questions. *Offshore Company v. Robison*, 266 F.2d 769, 780 (5th Cir. 1959). The issue of whether the barge was a vessel within the meaning of the law and whether the plaintiff was a member of a crew of that vessel at the time he was injured was submitted to the jury for its determination. The District Court in its memorandum opinion summarized the jury's verdict as finding that the plaintiff was injured in the course of his employment on a barge which was a vessel within the meaning of the law, that the plaintiff was a member of the crew of that vessel at the time he was injured, and that the injury was proximately caused by the defendant's negligence or by unseaworthiness of the barge or by both negligence and unseaworthiness.

Here the barge was in navigable waters and the men were working on a maritime installation. Part of plaintiff's work was on the barge itself in connection with his other duties constructing the dolphin. There appears to be a sufficient nexus between the plaintiff's work on the floating barge and the installation of the maritime dolphin structure to merit submitting the issue to the jury. In light of the record, we cannot say as a matter of law that the jury's verdict was legally erroneous. The jury can approve Jones Act coverage if there is evidence that (1) the injured workman performed at least a substantial part of his work on the vessel (virtually any floating structure used for trans-

port in navigable waters) and (2) the capacity in which he was employed and duties which he performed contributed to the function of the vessel or to the accomplishment of its mission. *Offshore Company v. Robison, supra* at 779.[6]

The facts of this case fall within the marginal area of Jones Act or maritime jurisdiction. However, since we believe the issues were properly submitted to the jury, we are not prepared to hold as a matter of law that the barge in question was not a vessel or that the plaintiff was not a crew member within the liberal definition of those terms under the Jones Act or the admiralty doctrine of unseaworthiness. As an appellate court, we must view the evidence in the light most favorable to sustaining the jury's verdict, and we accept as established all reasonable inferences which tend to support the jury's determination. We therefore find no error in the court's refusal to direct a verdict for the defendant.

The judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[6] Although the defendant also relies on *Rotolo v. Halliburton* Co., 317 F.2d 9 (5th Cir.), *cert. denied*, 375 U.S. 852 (1963), and *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973), we agree with the courts deciding those cases that their circumstances did not meet the *Offshore* standard stated here.

EXHIBIT B

In the United States District Court
Eastern District of Arkansas
Western Division

Max Slatton, Jr.,
Plaintiff,
v.
Martin K. Eby Construction Co., d/b/a Eby and Associates of Arkansas,
Defendant.
LR-72-C-201.

Memorandum and Order

(Filed in U. S. District Court November 28, 1973)

This admiralty case is now before the Court on the post trial motion of the defendant for judgment notwithstanding the verdict of the jury or, alternatively, for a new trial. The motion has been submitted on the record and full memorandum briefs filed by respective counsel.

The historical facts in the case are not in dispute. On May 16, 1972, plaintiff, Max Slatton, Jr., was employed as a welder by the defendant, Martin K. Eby Construction Co., d/b/a Eby and Associates of Arkansas, and he was working on a floating barge which was being used in the course of construction work in which the defendant was engaged on the Arkansas River near the cities of Little Rock and North Little Rock, Arkansas. On the date just mentioned plaintiff sustained an injury to his back while he and a fellow employee were undertaking to manually move some lengths of large pipe. At the time of his

injury plaintiff was covered by the Arkansas workmen's compensation statute and was paid benefits under that statute amounting to $1,732.96.

Plaintiff brought this action under the Jones Act, 46 U.S.C.A., section 788, alleging that he was a member of the crew of the barge on which he was working at the time of his injury, and that his injury was proximately caused by negligence on the part of the defendant. He also alleged that the barge was unseaworthy in that it did not have an adequate crew and equipment properly to perform the mission on which it was engaged.

In its pleadings the defendant denied liability. It took the position that the barge in question was not a "vessel," and that plaintiff was not a seaman or the member of the crew of any vessel at the time of his injury. The defendant also denied plaintiff's charges of negligence and unseaworthiness and took vigorous issue with the plaintiff as to the extent of his injury.

The case was tried to a jury. At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence the defendant moved for a directed verdict. Ruling on those motions was reserved, and the case was submitted to the jury which returned a verdict in favor of the plaintiff in the sum of $85,000.

On October 26, 1973, the Court filed a "Memorandum Opinion and Final Judgment" in favor of the plaintiff, and in that connection finally overruled the motions for directed verdict that had been made by the defendant in the course of the trial. The Court stated that implicit in the jury's verdict were findings that plaintiff was injured while working within the scope of his employment, that the barge on which plaintiff was working was a vessel, that at the time of his injury plaintiff was a member of the crew of the vessel, and that his injury was proximately caused by negligence on the part of the defendant or by unseaworthiness of the vessel or by both negligence and unseaworthiness. The Court found that the findings of the jury

were supported by substantial evidence. The Court also found that defendant's claim for limitation of liability under 46 U.S.C.A., section 183(a) should be rejected.

In determining the amount of the judgment to be entered the Court allowed credit for the amount that plaintiff had received by way of workmen's compensation and entered judgment in the net sum of $83,267.04 together with the cost of the action.

The motion now before the Court was timely filed on October 29, 1973.

The Court adheres to its view that plaintiff made a submissible case, and that the findings of the jury on the liability issues in the case were supported by substantial evidence. Hence, the basic prayer of the defendant for entry of a judgment in its favor notwithstanding the verdict will be, and it hereby is, Denied.

It is now necessary to consider the alternative prayers of the defendant which are for a full or partial new trial or for a substantial remittitur. Counsel for the defendant argues that the jury's verdict was against the weight of the evidence on the "seaman-member-of-the-crew" issue; that the verdict amounted to a miscarriage of justice, shocking to the conscience, and grossly excessive; and that it was error to submit to the jury the question of the permanency of plaintiff's injury.

The only one of those arguments that gives the Court any trouble is that the verdict was grossly excessive. There is no question that plaintiff sustained an injury to his back, and the Court thinks that the jury could properly find, as it obviously did find, that the injury was permanent, and that plaintiff is going to have some difficulty with his back in the future and has sustained some diminution of his ability to work and earn money in the future.

But, the Court is forced to agree with defense counsel that the jury's verdict was grossly and shockingly excessive in the

light of the evidence even after the defendant is allowed credit for the workmen's compensation that plaintiff has received.

Personally, the Court thinks that an award within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff, but the Court recognizes that the amount to be awarded in a case of this kind rests largely in the discretion of the jury. The Court thinks that the jury might have been justified under the evidence in awarding plaintiff as much as $50,000, but that any award in excess of that sum would have been so grossly excessive as to shock the conscience of the Court.

In view of what has been said it is Ordered that if the plaintiff within the next 20 days enters a remittitur in the amount of $33,267.04 defendant's alternative motion for a full or partial new trial will be denied. If the remittitur is not entered within that period of time, the Court's judgment will be set aside and a new trial ordered on the issue of damages only.

Dated this 28th day of November, 1973.

(S) J. SMITH HENLEY
United States District Judge

EXHIBIT C

In the United States District Court, Eastern District of Arkansas, Western Division

Max Slatton, Jr.,
Plaintiff,
v.
Martin K. Eby Construction Co., dba Eby and Associates of Arkansas,
Defendant.
LR-72-C-201

Memorandum Opinion

(Filed April 10, 1974)

This suit in admiralty which arises out of an accident that occurred on a barge on the Arkansas River near Little Rock, Arkansas, on May 16, 1972, was commenced in this Court on September 19, 1972. The case was tried to a jury in mid-October 1973, and the jury returned a verdict in favor of the plaintiff in the sum of $85.00.

Judgment on the verdict was entered. However, defendant moved for the entry of a judgment notwithstanding the verdict or, in the alternative, for a new trial. On November 28, 1973, the Court filed a Memorandum and Order dealing with defendant's post-trial motion. In its opinion the Court rejected the basic contentions of the defendant, but found that the jury's verdict was grossly excessive. The Court expressed the view that an award "within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff." However, the Court recognized that the amount to be awarded in a case of this kind rests largely in the discretion of the jury.

The Court held ultimately that unless plaintiff entered a remittitur in an amount sufficient to bring the judgment down to $50,000, a new trial on the issue of damages only would be ordered.

The plaintiff declined to enter the remittitur and, instead, sought to take an interlocutory appeal to the Court of Appeals for the Eighth Circuit under the provisions of 28 U.S.C.A., section 1292(a)(3). The Court of Appeals held that the Court's order in connection with the remittitur was not appealable and dismissed the appeal. Slatton v. Martin K. Eby Construction Co., 8 Cir., 1974, ... F. 2d ....

The order of the Court of Appeals dismissing the appeal and remanding the case for further proceedings was filed in the office of the Clerk of this Court on March 8, 1974. Thereafter counsel on both sides agreed that the question of damages should be submitted to the Court for determination on the basis of the record made at the original trial, and the Court has been supplied with a copy of the Appendix that plaintiff filed in the Court of Appeals. That Appendix contains all of the evidence relevant to the question of damages. That evidence consists of the testimony of the plaintiff and of the following witnesses: Dr. Thomas Rooney, an orthopedic surgeon who practices in North Little Rock and who treated plaintiff for his injury; Dr. Robert Watson, a Little Rock neurosurgeon, who examined plaintiff on two occasions at the instance of the defendant and who testified as an expert witness for the defense; Dr. Clyde Glover, a North Little Rock radiologist who made and evaluated, along with Dr. Rooney, certain X-ray films of plaintiff's lower back, and who testified under subpoena as a defense witness; Billy H. Dunn, an employee of the Arkansas Employment Security Division who undertook to find plaintiff a job in September 1973, and who was able to place him with the Moore Ford Co. of North Little Rock.

The Court has considered the evidence de novo, and is unable to find from it that plaintiff's injury was so severe or serious as to warrant an award outside the range mentioned in the Court's opinion of November 28, 1973.[1]

The historical facts relating to plaintiff's injury and present condition are not in dispute.

Plaintiff is a white male who was 31 years of age in the spring of 1972; he has an eighth grade education and is a certified welder. On May 16, 1972, he and a fellow employee of the defendant were undertaking to move certain heavy pipe by hand.[2] As the work proceeded, plaintiff sustained severe and temporarily incapacitating pain in his lower back which prostrated him. He was taken to Memorial Hospital in North Little Rock and was seen by Dr. Rooney in the emergency room. He was seen by Dr. Rooney in his office the next day, and thereafter he was hospitalized for several days and treated for his condition. When he was released from the hospital he was given certain medication, principally a muscle relaxant; that medication was discontinued in July 1972, and plaintiff was given a back brace. Both before and after the discontinuance of the medication in July plaintiff saw Dr. Rooney frequently and was examined by him; Dr. Rooney administered certain recognized neurologist tests and evoked some symptoms, most of which were subjective.

During the early summer of 1972 petitioner tried to do some light work for the defendants, but he testified that because of

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[1] The present submission of the issue of damages to the Court on the basis of the record made at the jury trial was at the suggestion of counsel for plaintiff who were aware of what the Court had said about damages in its November opinion.

[2] On previous occasions similar pipe had been moved by means of a crane, and the jury's finding of liability was evidently based in whole or in part on the failure of the defendant to provide a crane on the day on which plaintiff was injured.

pain in his back and legs he was unable to perform the tasks assigned to him.

In August 1972 plaintiff was again admitted to the hospital where he remained for several days. A myelogram was performed and in that connection X-ray pictures of plaintiff's lower back were made by Dr. Glover working in conjunction with Dr. Rooney.

On the basis of his numerous examinations of the plaintiff and his interpretation of the X-rays, Dr. Rooney made a diagnosis of a herniated disc between the fourth and fifth lumbar vertebrae. Surgery was discussed with plaintiff, and apparently an operation was scheduled. However, plaintiff turned out to be unwilling to submit to the operation and it was cancelled. Dr. Rooney did not insist upon the surgery because he did not think plaintiff's situation was such as to make surgery mandatory.

Plaintiff did not work the time of his release from the hospital in late August 1972 until late September 1973, and during that period he made no effort to find work. As stated, the suit was filed in September 1972.

In August 1973 plaintiff was examined on two occasions by Dr. Watson. In addition to examining plaintiff personally Dr. Watson considered the X-ray films that had been made the preceding year.

Around September 27, 1973, plaintiff contacted Mr. Dunn of the Employment Security Division seeking light work. He related to Mr. Dunn that he had a back problem, and that information was relayed by Mr. Dunn to prospective employers, three of whom declined to employ plaintiff because of what they supposed to be a back condition that would render his employment risky. Moore Ford Co. employed plaintiff in a job moving cars around the company premises. That job pays, ac-

cording to plaintiff, from $90 to $100 per week. Plaintiff also testified that while he was working as a welder, he earned $200 per week.

The Court has no difficulty in finding that plaintiff is entitled to compensation for the physical pain that he has endured down to the time of trial and for his medical and hospital expenses, which expenses amount in round numbers to $1400. The Court also finds that plaintiff is entitled to lost earnings to the extent that the loss may be reasonably attributed to his injury.

The Court further finds that plaintiff may very well have some trouble with his back in the future and will endure some pain and discomfort in the future on account of injury. But the Court does not find that plaintiff has suffered any permanent disability or that his capacity for earning money has been substantially impaired by his injury.

Dr. Rooney's diagnosis of a herniated disc is of doubtful validity in view of the paucity of objective symptoms commented upon by both Dr. Watson and Dr. Glover and for other reasons developed during the cross-examination of Dr. Rooney and in the course of the testimony of the other two doctors. Moreover, Dr. Rooney himself was by no means certain in his testimony about plaintiff's future outlook. He thinks that plaintiff will probably have some trouble with his back, but he does not know "how much it will bother him, or if it will bother him forever." And that is as far as Dr. Rooney appears to be willing to go. He did not testify in terms that plaintiff has any "permanent disability," and he did not attempt to measure any future disability in terms of percentage or otherwise.

While the Court does not feel that criticism of the plaintiff as a conscious malinger would be justified, the Court cannot overlook the fact that during most of the period of time covered by the record in this case plaintiff had this suit pending, and its pendency and the hope of a large award may very well

have affected adversely his motivation to return to his old trade or to find other remunerative employment.

Mention has been made of the fact that plaintiff's medical and hospital expenses amounted to about $1400, and the Court thinks that it would be fair to add another $100 to that figure to take care of small items with respect to which plaintiff may not have kept any record. So $1500 will be allowed for expenses.

Turning now to the question of lost earnings, the Court is not willing to compensate plaintiff at the rate of $200 per week from the date of his injury down to the time at which he went to work for Moore Ford Co. in late September or very early October 1973. As the Court figures it, that period includes approximately 72 work weeks, and an award on the basis of $200 per week would amount to $14,400. The Court thinks that had plaintiff made a reasonable effort to do so, he could have mitigated his loss of wages very substantially, and the Court is not willing to award him more than $7,500 for that item. The Court has found that plaintiff has endured physical pain and suffering on account of his injury for which he should be compensated, and the Court is willing to make some compensation for the pain that plaintiff is likely to suffer in the future. An award for pain and suffering cannot be measured by any objective yardstick, and the Court feels that $10,000 will be fair and reasonable compensation for plaintiff's past, present, and future pain and suffering.

To summarize: The Court will allow $1,500 for medical and hospital expenses, $7,500 for lost earnings, and $10,000 for pain and suffering. Let judgment in the amount of $19,000 be entered.

Dated this 10th day of April, 1974.

/s/ J. SMITH HENLEY
United States District Judge